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No. _____ OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES

Edwin Durand, and Madelaine Durand, *Petitioners,*

v.

UNITED STATES CUSTOMS, an Agency of and for the U.S. Department of the Treasury; et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Customs and Border Patrol ("CBP"), individual Customs agents, and the U. S. Attorney General's Office consider CBP agents to be "above the law" no matter how egregious their violations of the U. S. Constitution, the United States Code, or the Code of Federal Regulations are. CBP and the Attorney General base their concept of CBP agents being untouchable and "above the law" on the U. S. Supreme Court's decision in *Kosak v. United States*, 465 U.S. 848 and 28 U.S.C. § 2680(c). In a time when CBP/The Department of Homeland Security is in the daily news, the honesty and integrity of the agency, which is supposed to be keeping this country safe at its ports and borders, is crucial. No police agency should be given absolute power by being considered "above the law," where not even the courts are allowed to adjudicate viable causes of action.

This case involved certain Constitutional and tort causes of action against CBP and specific U.S. Customs agents along with alleged co-conspirators. Durand was deprived of their world-class V-12 Mercedes-Benz S600 sedan without Due Process notice or just compensation as required by the U.S. Constitution 5th Amendment.

1. Does not this case, which involves multiple violations, committed by CBP agents, of the U.S. Constitution 5th Amendment, the United States Code, and the Code of Federal Regulations, call for an exercise of this Court's supervisory power where there are multiple disputes between the Circuits of the Court of Appeals and within the Ninth Circuit itself, and the District Courts, as to whether CBP agents are considered "above the law" and completely immune from civil liability no matter how tortious or unconstitutional their actions are?

PARTIES TO THE PROCEEDING

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Petitioners

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U.S. Department of the Treasury
The United States of America
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CORPORATE DISCLOSURE STATEMENT

Petitioners are not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Edwin Durand and Madelaine Durand respectfully petition for writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Order and Opinion of the United States District Court for the Central District of California entered July 16, 2004 was not reported and is set forth in the Appendix at page 1a.

The Judgment and Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit, Hug, O'Scannlain, and Silverman, Circuit Judges, entered January 17, 2006, affirming the judgment of the District Court is not reported. The Judgment and Memorandum opinion are set forth in the Appendix at page 15a.

Petitioners did not request a rehearing.

JURISDICTION

The Judgment sought to be reviewed was entered by the Court of Appeals for the Ninth Circuit on January 17, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS & UNITED STATES CODES INVOLVED

The relevant portion of the U.S. Constitution, 5th Amendment states that a citizen may not "...be deprived of life, liberty, or property, without due process of law; nor

shall private property be taken for public use, without just compensation."

28 U.S.C. § 1346(b)(1), commonly known as the "Federal Torts Claims Act," which states in pertinent part: "...the district courts...shall have exclusive jurisdiction of civil actions on claims against the United States for money damages...for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. § 2680(c) which states in pertinent part: "The provisions of this chapter and section 1346(b) of this title shall not apply to - (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer,..."

STATEMENT OF THE CASE

The Basis for Federal Jurisdiction in the Court of First Instance

The District Court had jurisdiction under the Constitution of the United States, Article III, Section 2, 28 U.S.C. § 1331 and the Federal Tort Claims Act, 28, U.S.C. § 1346(b).

The Facts Material to Consideration of the Questions Involved

1. Procedural Background

Petitioners Edwin Durand and Madelaine Durand[1] filed their original action against U.S. Customs, an Agency of the Department of the Treasury, and U.S. Customs agents Christopher King (retired), Vera Adams, Port Director for Southern California, and Herb Hunter. (U.S. Custom's title was changed to Customs and Border Patrol, "CBP" under the Department of Homeland Security.)[2]

Petitioners named six other non-governmental defendants who were involved in the loss of their vehicle: 1) EG&G Technical Services, Inc. the auctioneering company who sold the vehicle; 2) Wallenius Wilhelmsen Lines Americas, LLC, the shipping company and its employee Mary Jo French; 3) Crescent Warehouse, Ltd., a California Corporation; 4) Mercedes-Benz and Ernie Cuneo, an employee of Mercedes-Benz.

This case arose in 2001 from the Federal Respondents' alleged unconstitutional violations of due process and just compensation that led to the loss of Durands' 1995 V-12 world-class Mercedes-Benz.

The United States Attorney Debra W. Yang filed a Notice of Substitution substituting the United States for the individual Federal Defendants as to the common law tort

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[1] Edwin Durand and Madelaine Durand hereinafter "Durand".
[2] Customs and Border Patrol hereinafter "CBP".

claims only per 28 U.S.C. § 2679(d)(1), which was immediately granted.

Federal Respondents filed a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The Motion alleged that the exception to the waiver of immunity set forth at 28 U.S.C. § 2680(c) barred Durands' claims. Said exception to the Federal Tort Claims Act ("FTCA") states that the "Act" does not apply to "Any claim arising in respect of the assessment or collection of any tax or customs duty, or detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer..." The Motion further stated that Durands' *Bivens* action was barred since Durand failed to follow CPB's alternative remedial scheme.

Durand filed an Answer to the Motion to Dismiss, which stated that they had never heard of any alternative remedial scheme until they received the Federal Respondents' Motion, no one from CBP had ever advised them of the existence of any alternative remedial scheme, that agent King refused to issue a written notice of detention, and that the vehicle was sold without notice, all in violation of due process.

On July 16, 2004, the District Court entered an Order granting the Motion to Dismiss. The Ninth Circuit Court of Appeal affirmed the Order on January 17, 2006.

2. The Material Facts Not In Dispute

Durand bought a rare world-class 1995 V-12 S600 Mercedes-Benz sedan from a dealer in Germany. Durands'

Mercedes was one of only 1200 produced for world-wide distribution.

The vehicle was shipped to Port Hueneme, where U.S. Customs agent Christopher King took possession of it.

Agent King gave conflicting verbal reasons for the detention, none of which he could substantiate. Durand supplied documentation to King which countered each of King's verbal reasons for the detention. On multiple occasions Durand requested written documentation as to the reasons for the detention of their vehicle, but agent King refused each time in violation of the Code of Federal Regulations 19 C.F.R. § 12.73(k) and 19 U.S.C § 1499(c)(1)(2), both of which clearly and precisely mandate that CBP issue a written notice of detention to the importer.

Agent King did not give Durand any notification of any "alternative remedial scheme" i.e. that a protest should be on Customs Form 19 or the right to file an action with the Court of International Trade. The Durands were novice importers with no knowledge of CBP's multiple "alternative remedial schemes".

Since Durand realized further protests to agent King were futile, Durand contacted Nevada Senator Ensign's office requesting that Senator Ensign act on behalf of Durand in order to extricate their vehicle.

Commissioner Bonner's office responded by letter to Senator Ensign who forwarded the letter to Durand. Commissioner Bonner's letter fraudulently misrepresented the facts and omitted the notification, mandated by 19 U.S.C. § 1515(a) and 19 C.F.R. § 174.30, that Durand had a

right to file an action with the Court of International Trade.[3]

Durand contacted CBP's Ombudsman's office and was informed that the vehicle would be safely stored and that Durand would be given a thirty (30) day notice before the vehicle was either sold or the government took title. 19 C.F.R. § 127.24 mandates that a written notice be sent thirty (30) days in advance of any sale and 19 C.F.R. § 127.14(b) allows entry to be made any time prior to the sale.

Had Commissioner Bonner's letter to Senator Ensign properly informed Durand that they had the right to file a civil action with the Court of International Trade, Durand would have had 180 days to file. The time for filing starts running from the date of the mailing of the notice. Senator Ensign's office mailed Bonner's letter to Durand on January 7, 2002. Durand had until July 8, 2002 to file.

However, Durand's vehicle was sold on June 27, 2002, eleven (11) days before the 180-day time period was up. Durand never received any thirty (30) day notice of sale as mandated by 19 C.F.R. § 127.24.

In August, 2002, Durand sent a representative to Crescent Warehouse to make arrangements to have the vehicle released only to find that the vehicle had been sold, without notice, on June 27, 2002.

It was later discovered that agent King had intentionally

[3] The Bonner letter stated Durand had only two options, either bring in the vehicle through a Registered Importer or sell the vehicle "export only". However the vehicle was not sold by CBP "export only". Allegedly it was sold to a CBP agent.

changed Durands' address in CBP's computer so that if any thirty (30) day notice of sale was actually sent by another agent, it would be sent to the wrong address. This was in retaliation for Durand questioning King's authority after King stated he ran the port and no one could touch him no matter what he did. The Federal Respondents never offered any evidence that a notice had actually been sent.

CBP and its agents violated multiple mandatory United States Codes and Code of Federal Regulations along with the U.S. Constitution 5th Amendment Due Process and Just Compensation Clause, and through their actions denied Durand any access to any "alternative remedial scheme" causing extreme stress and a great financial loss.

After Durand found that their vehicle had been sold, they contacted the Ombudsman's office and were told they had to file an administrative claim before they could file a civil action. In compliance with 28 U.S.C. § 2675, Durand filed an administrative claim prior to filing the Complaint. On October 3, 2003 the claim was administratively denied and the Complaint was filed within 6 months of the denial.

The matters at issue are questions of law: 1) as to whether the exception to the waiver of immunity in the Federal Tort Claims Act set forth in 28 U.S.C. § 2680(c) absolves all actions by Customs agents no matter how unconstitutional or illegal. Are Customs agents considered untouchable and "above the law"?; and 2) as to whether a *Biven's* action against the individual agents involved based on the lack of 5th Amendment Due Process notification, is barred.

THE REASONS RELIED ON FOR GRANTING THE PETITION

1. The Courts Have Conflicting Interpretations of the Federal Tort Claims Act Exception 28 U.S.C. § 2680(c).

a. The Ninth And Fifth Circuit Courts Of Appeals Incorrectly Defined The U.S. Supreme Court Case *Kosak v. United States* As Exempting Customs Agents From All Liability For Intentional Tort Claims And Constitutional Violations, Which Is In Direct Conflict With Several Other Ninth Circuit Decisions And With Decisions From The United States District Courts For Massachusetts And New York.

The Federal Tort Claims Act, 28 U.S.C. § 1346(b) waives government immunity for injury or loss of property "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment..."

The 28 U.S.C. § 2680(c) exception states that the provisions of the FTCA shall not apply to "Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise..."

Here the Federal Respondents have argued that the exception to the waiver set forth in 28 U.S.C. § 2680(c) and the alleged availability of the alternative remedial scheme deprived the District Court of subject matter jurisdiction.

Federal Rule of Civil Procedure 12(b)(1)and (6) permit's the lack of jurisdiction of the subject matter or failure to

state a claim upon which relief can be granted, to be raised by Motion. Challenges to subject matter jurisdiction or failure to state a claim contest the sufficiency of the pleadings and the trial court must accept the complaint's allegations as true. *Cervantes v. United States* 330 F. 3d 1186 (9th Cir. 2003), and *NE Hub Partners, L.P. v. CNG Transmission Corp.* 239 F.3d 333, 341 & n. 7 (3rd Cir. 2001). Therefore the issue before the District Court was whether, accepting the allegations in the Complaint as true, this Complaint should have survived Respondent's Motion.

In the present case, the Ninth Circuit stated;

> "The district court's dismissal of common law tort claims against the CBP and the individual federal employees was also proper. *See Gasho v. United States*, 39 F.3d 1420, 1433, (9th Cir. 1994) (holding that the Federal Tort Claims Act exempted from liability intentional tort claims arising out of a customs officer's seizure of goods); *Kosak v. United States* 465 U.S. 848, 862 (1984)". (Cert. App. Page 16a)

However, *Kosak* stated the exact opposite of what the Ninth Circuit stated above in the present case. *See Kosak* 465 U.S. at 862;

> "Petitioner and some commentators argue that 2680(c) should not be construed in a fashion that denies an effectual remedy to many persons whose property is damaged through the tortious conduct of customs officials. That contention has force, but it is properly addressed to Congress, not to this

> Court. The language of the statute as it was written leaves us no choice but to affirm the judgment of the Court of Appeals that the Tort Claims Act does not cover suits alleging the customs officials injured property that had been detained by the Customs Service."

Even though *Kosak* stated that § 2680(c) barred civil actions against the Customs Service for damage to detained property, the Supreme Court further stated that a party retained the right to sue the individual customs agent who negligently damaged his goods. (at 680)

The Ninth Circuit in *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994) held that the Gasho's emotional distress claim was barred by 28 U.S.C. § 2680(c) insofar at it relied on injuries stemming from Customs' seizure of the aircraft. (at 1434) However the Ninth Circuit reversed the summary judgment on the FTCA and *Bivens* claims based on the arrests even though the arrests were based on the seizure of the airplane's log books. (at 1439)

In *Solus Ocean Systems, Inc v. United States Customs Service*, 777 F.2d 326, 328 (5TH Cir. 1985) the importer had not been notified that CBP had received his merchandise and the merchandise was sold by CBP without the mandated thirty (30) day notice. The 5th Circuit, referring to *Kosak*, stated; "The Supreme Court stated that the language in Section 2680 was entitled to a broad rather than a narrow interpretation and included all injuries associated with the detention." This of course is incorrect since *Kosak* specifically stated that Section 2680(c) prohibited a civil action for damages to property that may or may not have happened during the Customs detention. *Kosak* never discussed whether § 2680(c) immunized CBP agents when

they violated Due Process by not notifying a party before they sold the merchandise. The 5th Circuit concluded that even though CBP had violated their own mandatory regulations about notice (not to mention the constitutionally mandated notice) CBP was immune.

The Fifth Circuit in *Jeanmarie v. United States*, 242 F.3d 600 (5th Cir. 2001) held that Jeanmarie's claims of being beaten by CBP agents for trying to use the restroom was barred 28 U.S.C. § 2680(c) since the beating took place while the CBP agents were inspecting his vehicle. The 5th Circuit relied on one of their earlier opinions, *Capozzoli v. Tracey* 663 F.2d 654 (5th Cir. 1981) stating that § 2680(c) encompasses any activity by a CBP agent which is even "remotely related to his or her official duties". (at 604)

But in *Perez v. The United States of America* 844 F. Supp. 984 (Southern District of New York 1994), the District Court held that the § 2680(c) exemption does not bar a claim based on the Government's failure to give the mandatory statutory notice before disposing of seized property. (Vacated due to settlement, 857 F. Supp. 16 (S.D.N.Y. 1994))

And in *Bielass v. New England Safe System, Inc, and the United States of America*, 617 F. Supp. 682 (D. Mass 1985), CBP had not given the Bielass' the mandated thirty (30) day notice before selling their property. The District Court granted the United States' motion for summary judgment with respect to the FTCA claims but, following *Kosak*, allowed the Bielasses to proceed against CBP under their "breach of contract" claim. *Bielass* is directly on point with the present case since CBP did not give Durand the mandated thirty (30) day notice before they sold the vehicle.

In the present case the Ninth Circuit stated the district

court properly dismissed Durands' *Bivens* cause of action "because an alternative remedial scheme for relief existed, and the Durands failed to follow it. (Cert. App. 16a) The Ninth Circuit completely ignored the fact that the "alternative remedial scheme" was not available to Durand because CBP did not provide the statutorily mandated written notice of detention, the mandatory thirty (30) day notification of sale, and the notification of their right to file a civil action in the Court of International Trade. Even if Commissioner Bonner's letter had notified Durand they had 180 days to file in the Court of International Trade, CBP sold the vehicle before the 180 days was up. The Ninth Circuit cited *Libas Ltd. v. Carillo*, 329 F.3d 1128, (9th Cir. 2003) stating that Durands' *Bivens* action was properly dismissed since Durand could have followed the "alternative remedial scheme" like *Libas* did. However, *Libas* was an import company with extensive experience with and knowledge of the ins-and-outs of CBP's "alternative remedial schemes". In the present case, Durand was a novice at importing, had no knowledge of any "alternative remedial scheme" and was not notified by anyone connected to CBP about the procedures for filing protests and a civil action with the Court of International Trade.

In fact, the above decision by the Ninth Circuit directly conflicts with *Stuhlbarg International Sales Company, Inc. v. John D. Brush and Company, Inc.*, 240 F.3d 832, 838 (9th Cir. 2001) where the Ninth Circuit stated that an importer who never received an official written notice of exclusion is precluded from any alternative remedial scheme. *Stuhlbarg* is directly on point with the present case since the Durands had never received a written notice of exclusion from agent King and had not been informed by any CBP agent of the availability to file with the Court of International Trade.

Additionally, in *Gete v. Immigration and Naturalization Service*, 121 F.3d 1285 (9th Cir. 1997) the Ninth Circuit stated; "A challenge to an agency's procedures on constitutional grounds may properly be brought in federal court, citing the Supreme Court in *Califano v. Sanders*, 430 U.S. 99, 109.

Gete v. INS was a class-action suit involving INS agents who were seizing and forfeiting vehicles without notifying the owners of their rights or providing them with the information or documentation necessary to retrieve their vehicles. The vehicle owners were not given documentation as to why the vehicles had been seized nor were they told that should they proceed with the cheaper so-called "administrative remedy" they would be barred from having the INS decision reviewed in court. The vehicle owners were also not informed that the "administrative remedy" was that the decision to forfeit or release their vehicles rested on the decision of one INS agent, who was free to make a favorable decision for someone he liked and an unfavorable decision based on his own prejudice against minorities, ethnicity, religion, sex, or sexual orientation.

The Ninth Circuit further stated;

> "Courts are properly reluctant to look into complex, fact bound, discretionary determinations of an agency's decision-making process. But they must be equally reluctant to license "free-wheeling agencies [to mete] out their own brand of justice."

Gete is directly on point with the present case.

The INS is now under the Department of Homeland Security along with Customs and Border Patrol.

The conflict between the holdings of the different Circuits and District Courts along with the different holdings within the Ninth Circuit itself calls for the exercise of this Court's supervisory power.

b. The Complaint

The Complaint alleged that Federal Respondent CBP agent Christopher King detained the vehicle but refused to issue a written notice of detention. (Complaint, Paragraphs 31, 46, 78, & 89) The Complaint alleged that King stated he ran the port, no one could stop him from doing what he wanted to do, and no one dare question his authority. (Complaint, Paragraphs 30, 43, & 56) The Complaint alleged that the vehicle was auctioned without Due Process notice. (Complaint, Paragraphs 48, 89) The Complaint alleged that the letter to Senator Ensign from Commissioner Bonner stated the vehicle could be sold "export only". However, the vehicle was not sold "export only". (Complaint, Paragraphs 47, 48) The Complaint alleged the vehicle was sold without the mandatory thirty (30) day notice. (Complaint, Paragraphs 67, 69, & 70,) The Complaint alleged that Durands' mailing address had been maliciously changed but that the Federal Respondents could have notified them of the impending sale since the Federal Respondents had Durands' street address and telephone number. (Complaint, Paragraphs 71, 75, 77, 80, 83, 85, 87, & 89) The Complaint then alleged that Durand was caused great financial, physical, and mental harm. (Complaint, Paragraphs 141-end)

Durand's Complaint did not include the allegation that they were precluded from the "alternative remedial scheme" since they had no knowledge of any

administrative remedy until the Federal Respondents filed their Motion to Dismiss. Had Durand known that they could file a civil action with the Court of International Trade they would have, and then their case would have been taken out of the hands of the CBP agents who consider themselves "above the law" and into the hands of a tribunal who would have given Durand their right to be heard.

c. <u>The Fifth Circuit's Decisions Regarding § 2680(c) Can Lead To Absurd And Unlawful Results.</u>

The problem that has arisen from the many misinterpretations of the statement in *Kosak*, as stated above in the present case, is that CBP agents consider themselves "above the law" and some courts have agreed with them.

In *Gasho*, 39 F.3d 1420 at 1433, the Ninth Circuit stated; "The Gashos cannot base their emotional distress claims on the seizure, even if it was without probable cause." Even though a search and seizure without probable cause is a violation of the 4th Amendment, if it is done by a CBP agent, the victim is left without redress. Therefore, 28 U.S.C. § 2680(c) trumps the U.S. Constitution.

The statement by the Fifth Circuit in *Jeanmarie* that anything even remotely related to a CBP agents' duties is immune, shreds the 4th Amendment (unreasonable searches and seizures) along with the 5th Amendment Due Process clause.

However, the Ninth Circuit opinion in *Cervantes v. United States of America*, 330 F.3d 1186 (9th Cir. 2003), is opposite of the Fifth Circuit's statement in *Jeanmarie* that §2680(c) encompasses any activity by a CBP agent which is

even "remotely related to his or her official duties".

In *Cervantes,* the government sold a seized vehicle without inspecting it for the presence of narcotics, and later arrested the purchaser when the narcotics were discovered during a search of the vehicle at the border. The U.S. Attorney automatically filed a Motion to Dismiss based on § 2680(c). The Ninth Circuit stated the purchaser's claim for negligent inspection was not barred by the § 2680(c) exclusion to the FTCA. In fact, the Ninth Circuit stated that the U.S. Attorney's assertion that the claim was barred by § 2680(c) was "so off-the-mark as to be embarrassing".

28 U.S.C. § 2680(c) is continually used to have legitimate cases against CBP and its agents automatically dismissed. In fact, Madelaine Durand telephoned the United States Attorney's office in Los Angeles, California in order to find out who she was to serve the Complaint on. She spoke to Mr. Leon W. Weidman, Assistant U.S. Attorney, who told her that he did not care who she served the complaint on because any case against CBP or any CBP agent would be "automatically dismissed".

According to the Fifth Circuit and those courts who are following the rulings of the Fifth Circuit, if a CBP agent assaults someone for trying to use the restroom, the agent in immune. If a CBP agent commits a warrantless search and seizure, or falsely arrests someone without probable cause, the agent is immune. If a CBP agent removes merchandise or a vehicle from a warehouse for his own use, he is immune. If a CBP agent seizes and forfeits private property or personal property based on his prejudice against someone's race, religion, ethnicity, sex, or sexual orientation, he is immune.

d. **An Examination Of The Legislative History And Congressional Intent Behind § 2680(c) Reveals That Durands' Claim Is Not Barred.**

In discussing the Federal Tort Claims Act, the Supreme Court, in *Kosak* at 854, stated: "...unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute."

After studying the Legislative history behind § 2680(c), the Supreme Court stated that the three objectives for the exception to the FTCA are:

1) to ensure that certain governmental activities not be disrupted by the threat of damages suits;

2) to avoid exposure of the United States to liability for excessive or fraudulent claims; and,

3) not to extend the coverage of the Act to suits for which adequate remedies were already available.

As to #3, Durand was barred from the "adequate remedy" by the actions of CBP in not notifying them of the remedial process in violation of Due Process.

In *Perez*, at 986-987, the District Court for the Southern District of New York correctly interpreted *Kosak* by stating:

> "First, important governmental activities will not be disrupted by permitting suits for defective notice or insufficient notice. Indeed, the Supreme Court has recently emphasized that proper notice in the case of forfeiture of property is not only required by statute but is mandated by the Due Process Clause of the Fifth Amendment. *United States v. Good*, U.S. 114 S. Ct. 492 (1993). Second, while excessive

> or fraudulent claims may clearly flow from instances in which detained property is damaged, they are much less likely to arise from cases such as the one at hand which merely claims a lack of notice -- a claim which can be established on the record. Third, there is no other judicial remedy for claims of negligence by government employees in providing notice in forfeiture cases."

e. 28 U.S.C. § 2680(c) Must Be Reconciled With The Constitution And 28 U.S.C. § 2006.

The Fifth Circuits decision in *Solus* and *Jeanmarie* and the Ninth Circuits decision in the present case cannot be reconciled with the U.S. Constitution Fifth Amendment or 28 U.S.C. § 2006.

28 U.S.C § 2006 provides that judgments in suits against a CBP agent shall be paid out of the Federal Treasury if a court certifies that there existed probable cause for the detention of the goods and that the official was acting under the directions of an appropriate supervisor. Therefore the Fifth Circuit's decisions in *Solus* and *Jeanmarie*, along with the Ninth Circuit's adoption of the same idea in the present case, that CBP agents are completely immune from any liability if the alleged illegal or unconstitutional actions are even remotely related to their official duties, cannot be reconciled with § 2006. In fact, the above stated construction would render § 2006 meaningless, which is an idea that has been consistently rejected.

f. Durands' *Bivens* Claim

The Federal Respondents have stated that Durands' *Bivens* claim is barred since Durand did not follow the "alternative remedial scheme". (Cert. App. 16a)

The record clearly demonstrates that Durand had no knowledge of the "alternative remedial scheme", that CBP had never notified Durand of the availability of a "scheme," and that the Federal Respondents violated the U.S. Constitution 5th Amendment Due Process Clause, 19 U.S.C. § 1499(c)(1)(2), 19 C.F.R. § 12.73(k), 19 U.S.C. § 1515(a), 19 C.F.R. § 174.30, 19 C.F.R. § 127.24, and 19 C.F.R. § 127.14(b), all of which clearly and precisely mandated the duties of the CBP agents. Therefore, Durand should be allowed to proceed with their *Bivens* action against the individual Federal Respondents.

> "To establish a claim of unconstitutional deprivation under the Fifth Amendment, a plaintiff must allege that he was deprived of a protectable interest, that the deprivation was due to some government action, and that the deprivation was without due process. In addition, a plaintiff must allege that the government official's actions involved more than mere negligence. To prevail, the plaintiffs must allege that [the defendant] knowingly, willfully or recklessly caused the alleged deprivation." (Internal citations omitted.) *Kaufmann v. United States of America*, 876 F. Supp. 1044, 1049 (District Court for Eastern District of Wisconsin, 1995).

In the present case, the record clearly shows that Durand should be able to proceed with their *Bivens* action against the individual Federal Respondents.

CONCLUSION

The issues herein are of national importance and relate to significant issues worthy of this Court's attention. Several Circuits and District Courts and the Ninth Circuit have thoroughly examined the issue and reached contradictory opinions indicates that this is a matter requiring this Court's supervisory powers and direction.

WHEREFORE, Petitioner prays this Court grant a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX TO PETITION

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EDWIN DURAND, et al., Plaintiffs,

vs.

U.S. CUSTOMS, et al. Defendants.

CV 04-2377 FMC (SSx)

ORDER GRANTING MOTION TO DISMISS OF DEFENDANTS UNITED STATES OF AMERICA U.S. CUSTOMS, U.S. DEPARTMENT OF THE TREASURY, VERA ADAMS, HERBERT HUNTER AND CHRISTOPHER KING

This matter is before the Court on the Motion to Dismiss of Defendants United States of America, U.S. Customs Service (now known as the Department of Homeland Security, U.S. Customs and Border Protection) ("CBP"), U.S. Department of the Treasury (the "Treasury"), Vera Adams, Herbert Hunter and Christopher King (docket no. 38), filed June 16, 2004. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for July 19, 2004, is removed from the Court's calendar. For the reasons set forth below, the Court hereby grants the Motion to Dismiss.

I. Introduction

Edwin and Madelaine Durand (collectively, "Plaintiffs") filed the current action on April 5, 2004, which arose from Plaintiffs' unsuccessful importation of a Mercedes-Benz purchased in Germany. Plaintiffs sued a number of defendants, including CBP, the U.S. Department of the Treasury, and three individual CBP employees (the "Moving Defendants"), asserting various causes of action. The individual CBP employee

defendants are Vera Adams, the Port Director of the Los Angeles/Long Beach Seaport and Port Hueneme, Inspector Herbert Hunter and former Part Director Christopher King (collectively the "Individual Federal Defendants").1 The Complaint asserts the following causes of action against Moving Defendants: (1) violation of the Due Process Clause of the U.S. Constitution against all Moving Defendants; (2) conversion against CBP, Hunter and King; (3) fraud against CBP, Hunter, King and Adams; (4) collusion against CBP, Hunter, King and Adams; (5) profiteering against CBP and Adams; (6) coercion and duress against CBP and King; (7) pain and suffering against all Moving Defendants; and (8) attorney's fees against all Moving Defendants.

On June 14, 2004, the United States Attorney for the Central District of California filed a notice of substitution of the United States of America as defendant in place of individual defendants Adams, Hunter, and King with respect to common law tort claims against those individual defendants. The notice of substitution was filed pursuant to 28 U.S.C. § 2679(d)(1).

In addition, Plaintiffs asserted the following claims against Wallenius Wilhelmsen Lines Americas, LLC ("WWLA") and its employee, Mary Jo French (collectively, the "WWLA Defendants"): (1) violation of due process of law, (2) conversion, (3) fraud, (4) collusion, (5) pain and suffering, and (6) attorney's fees. Plaintiffs asserted the following claims against Mercedes-Benz, USA, LLC ("MBUSA") and its employee, Ernie Cuneo (collectively, the "MBUSA Defendants"): (1) violation of the Sherman Act, (2) pain and suffering, and (3) attorney's fees.

---------- Footnote ----------

n1 Port Director King has retired from Federal service since the events pertaining to this case.

---------- End Footnote ----------

On June 14, 2004, this Court granted the MBUSA Defendants' Motion to Dismiss with prejudice and granted the

WWLA Defendants' Motion to Dismiss without prejudice.

II. Factual Background

Plaintiffs purchased an S600 Mercedes-Benz from a dealer in Germany. (Complaint at ¶25.) WWLA transported the vehicle, via ocean carriage, from Bremerhaven, Germany to Port Hueneme, California. (Complaint at ¶26.) The vehicle arrived in Port Hueneme on August 6,2001. WWLA provided Plaintiffs with a Notice of Arrival, and directed Plaintiffs to CBP, which held the Mercedes for entry of import. (Complaint at ¶1126, 27.) Subsequently, disputes between Plaintiffs and CBP developed, and the Mercedes was never released to Plaintiffs. (Complaint at 111126, 48.)

At one point, Christopher King, a CBP agent, received a letter from Cuneo, an employee of MBUSA, stating that the Mercedes did not conform to all U.S. safety and emission standards, and was never certified for sale in the U.S. market by MBUSA.[2] (Complaint at ¶1134, 35.) Based on this opinion letter, King continued the confiscation of the Mercedes and eventually, CBP sold it in a public auction. (Complaint at 111139, 48.) King indicated that in order to identify the deficiencies and then correct them to meet United States standards, the vehicle would have to be shipped to an Independent Commercial Importer ("ICI") or a Registered Importer ("RI"). (Complaint at ¶40.) Plaintiffs contacted several such companies, and upon receipt of the price quotes, determined not to have the vehicle "federalized" using that method in part because of the expense. (Complaint at ¶1141-43.)

---------- Footnote ----------

n2 Plaintiffs contend that the content of the letter is false. (Complaint at ¶1136, 37.)

---------- End Footnote ----------

Plaintiffs contacted United States Senator John Ensign regarding CBP's refusal to permit entry of the vehicle into the

United States. (Complaint at ¶46.) On December 27, 2001, Robert Bonner, the CBP Commissioner, wrote a letter to Senator Ensign in response to Ensign's inquiry into the status of the vehicle. Bonner explained that the vehicle, which was less than 25 years old and was not certified to the applicable Federal Motor Vehicle Safety Standards, must be imported by a Registered Importer, who would bring the vehicle into conformity with the safety standards and affix a certification label to the vehicle. Bonner acknowledged that Plaintiffs were unable to provide documentation that the vehicle was in compliance with the Environmental Protection Agency ("EPA") and Department of Transportation ("DOT") standards, or that the vehicle was manufactured for the U.S. market. (Complaint at Ex.5.) After granting Plaintiffs an extension to obtain waivers from the EPA and DOT, get documentation from Mercedes-Benz showing the vehicle was in compliance, or import the non-conforming vehicle through an ICI/RI, CBP sent the vehicle to a General Order warehouse. The letter informed Plaintiffs that they had six months from the date of importation to complete the entry or export of the vehicle, and that if Plaintiffs took no further action after six months, the vehicle would be deemed abandoned to the Government and become eligible for sale by CBP. (Complaint at Ex.5.)

Plaintiffs allege the vehicle was auctioned on June 27, 2002 and that the sale unconstitutionally deprived them of their property and violated their right to due process. (Complaint at ¶67.) Plaintiffs claim that they did not receive advance notice of the auction. (Complaint at ¶48.)

III. Standards for Dismissal

A motion to dismiss an action for lack of subject matter jurisdiction is properly brought under Federal Rule of Civil Procedure 12(b)(1). The objection presented by this motion is that the court has no authority to hear and decide the case. When considering a Rule 12(b)(1) motion challenging the substance of jurisdictional allegations, the Court is not restricted to the face of the pleadings, but may review any evidence, such as declarations

and testimony, to resolve any factual disputes concerning the existence of jurisdiction. *See McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). The burden of proof on a Rule 12(b)(1) motion is on the party asserting jurisdiction. *See Sopcak v. Northern Mountain Helicopter Serv.*, 52 F.3d 817, 818 (9th Cir. 1995).

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) requires the Court to determine whether the Complaint states any claim upon which relief may be granted. The Court will not dismiss the claims for relief unless the plaintiffs cannot prove any set of facts in support of the claims that would entitle them to relief. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998). In limiting its inquiry to the content of the Complaint, the Court must take the allegations of material fact as true and construe them in the light most favorable to the plaintiffs. *See Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985). Additionally, the Court "is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 755 (9th Cir. 1994).

IV. Discussion

A. Pain and Suffering and Attorney's Fees

Compensation for pain and suffering and an award of attorney's fees are prospective measures of damages, not separate causes of action. Plaintiffs have cited no authority for the concept that there exist independent causes of action for pain and suffering and attorney's fees. The Court dismisses Plaintiffs' separate claims of pain and suffering and attorney's fees against the Moving Defendants with prejudice.

B. Constitutional Tort Claim - Violation of Due Process

Plaintiffs assert that Defendants CBP and the Treasury violated their Due Process Rights, by selling the vehicle without notifying Plaintiffs. Moving Defendants argue that dismissal of

this claim against CBP and the Treasury is appropriate under Federal Rule of Civil Procedure 12(b)(1), as this Court lacks subject matter jurisdiction over claims against federal agencies, where there has been no waiver of sovereign immunity.

Absent a waiver or consent, sovereign immunity shields the Federal Government and its agencies from suit. *See Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471,475, 114 S.Ct. 996 (1994). Sovereign immunity is jurisdictional in nature; where sovereign immunity applies, the Court has no subject matter jurisdiction. *Id.* Plaintiffs appear to assert a *Bivens* claim, in which government officials may be held personally liable for violations of an individual's constitutional rights, committed under the color of government authority. *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.s. 388, 394-97, 91 S.Ct. 1999 (1971).

However, a *Bivens* claim may be maintained only against the federal agent accused of the constitutional violation, and not against the agency employing the agent; there is no waiver of sovereign immunity for *Bivens* claims asserted directly against federal agencies. *See Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 475, 114 S.Ct. 996 (1994); *see also Rivera v. United States*, 924 F.2d 948, 951 (9th Cir. 1991) (United States has not waived sovereign immunity with regard to *Bivens* claims).

Plaintiffs offer no argument or authority to the contrary. Plaintiffs merely reiterate their conclusion that, due to allegedly intentional tortuous conduct, there is no immunity for any of the Moving Defendants, which does not address the sovereign immunity of federal agencies. Accordingly, the Court hereby dismisses with prejudice Plaintiffs' violation of due process claim against Defendants CBP and the Treasury.

Plaintiffs also assert the *Bivens* claim against Individual Federal Defendants Adams, Hunter and King. Moving Defendants argue that dismissal of the violation of due process claim asserted against the Individual Federal Defendants is appropriate under Federal Rule of Civil Procedure 12(b)(6), because Plaintiffs failed

to follow the alternative remedial scheme established by Congress and therefore fail to state a claim for relief

A *Bivens* claim may be expressly precluded "when Congress has provided an alternative remedy which it explicitly declares to be a substitute for recovery under the Constitution and views as equally effective." *Moore v. Glickman*, 113 F.3d 988, 991 (9th Cir.1997); *Schweiker* v. *Chilicky*, 487 U.S. **412, 423, 108 S.Ct. 2460 (1988). A** *Bivens* claim may be impliedly precluded "when defendants can demonstrate the existence of 'special factors counseling hesitation in the absence of affirmative action by Congress." *Id.* (quoting *Chilicky*, 487 U.S. at 423(1988)). "Special factors" include the presence of a deliberately crafted statutory remedial system. *See Kotarski v. Cooper*, 866 F.2d 311, 312 (9th Cir. 1989) ("Where Congress has designed a program that provides what it considers adequate remedial mechanisms for constitutional violations, *Bivens* actions should not be implied."); *Berry v. Hollander*, 925 F.2d 311, 313 (9th Cir. 1991) ("[W]here Congress has provided *some* mechanism for relief, *Bivens* claims are precluded."); *Adams v. Johnson*, 355 F.3d 1179, 1183-1184 (9th Cir. 2004).

The Ninth Circuit recently found that implied preclusion under the special factors analysis is appropriate in the context of a Customs dispute. *See Libas Ltd. v. Carillo*, 329 F.3d 1128 (9th Cir. 2003). In *Libas*, the dispute involved the plaintiff paying a higher-than-appropriate duty rate on imported goods. *Id.* at 1129. After pursuing the remedial scheme set up by Congress, including filing an appeal in the Court of International Trade the plaintiff commenced a *Bivens* action against employees of the Customs Service, alleging they violated its Constitutional rights. *Id.* The Ninth Circuit affirmed the district court's dismissal of the *Bivens* claim, and held that "an importer may not bring a *Bivens* action to recover consequential damages against Customs agents who assessed import duty at an incorrect rate. *Bivens* actions do not lie when Congress has created an alternative remedial scheme ... even though the scheme does not permit the recovery of all elements of the damage the importer claims to have suffered." *Id.*

In *Libas*, the Ninth Circuit identified the remedial

scheme Congress established by which importers may challenge classification of goods. The remedial scheme includes: (1) filing a protest under 19 U.S.C. § 1514(a)(4); (2) filing suit in the Court of International Trade under 19 U.S.C. § 1514 and 28 U.S.C. § 158 1(a); and (3) filing an appeal to the Court of Appeals for the Federal Circuit under 28 U.S.C. §1295(a)(5). *Id.* at 1130-31. The Ninth Circuit held that the existing statutory scheme and the Federal Tort Claims Act's ("FTCA") exemption of Customs officers from suit "support the district court's conclusion that 'special factors counsel hesitation' against recognizing a *Bivens* claim against Customs officers for consequential damages in a commercial setting. *Id.* at 1131 (citation omitted).

The same remedial statutory scheme available to the plaintiff in *Libas* was available to Plaintiffs in this action. The Tariff Act of 1930 provides that CBP has the authority to permit entry of merchandise into the United States, and the merchandise cannot enter until it is inspected and found to comply with the laws of the United States. 19 U.S.C. § 1499(a)(l). Once merchandise is presented for customs examination, CBP has five days to decide whether to release or detain the merchandise and issue a detention notice. 19 U.S.C. § 1499(c)(1) and (2). If CBP fails to make a final determination regarding the admissibility of the detained merchandise (merchandise not released within the five day period) within thirty days after the merchandise was presented for customs examination, then the failure to make a determination "shall be treated as a decision of the Customs service to exclude the merchandise for purposes of 19 U.S.C. 1514(a)(4)." 19 U.S.C. § 1499(c)(5)(A).

The exclusion of the merchandise from entry is "final and conclusive upon all persons. . . unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade." 19 U.S.C. § 15 14(a). If an administrative protest is filed and the agency takes no action within thirty days, or if the protest is denied before the expiration of thirty days, the claimant may file a civil action contesting the deemed denial in the Court of International Trade. 19 U.S.C. § 1499(c)(5)(B), 19 U.S.C. § 1514(a).

Plaintiffs do not dispute that there is an alternative remedial scheme; Plaintiffs argue that the remedial scheme was not available to them. Plaintiffs argue that they could not file a protest, because under 19 U.S.C. § 1514(c)(3)(A), the protest cannot be filed before notice of liquidation. However, this case does not involve the liquidation of duties under § 1514(c)(3)(A); rather, Plaintiffs could have filed a protest under § 1514(c)(3)(B) within ninety days after the date of the decision as to which the protest is made. However, Plaintiffs did not file any protest of CBP's decision to refuse entry of the vehicle into the United States.

Plaintiffs also argue that they could not file a protest because there was no "written decision as to the reasons for the seizure of their vehicle." (Pls.' Opp. at 10:20-21.) Plaintiffs offer no authority for the proposition that the decision to reject entry of the vehicle into the United States had to be in writing before they could file a protest. Under 19 U.S.C. § 1499(c)(5)(D), CBP's failure to make a final determination regarding the admissibility of the detained merchandise within thirty days after the merchandise was presented for customs examination was to be "treated as a decision of the Customs service to exclude the merchandise for purposes of 19 U.S.C. 1514(a)(4)." 19 U.S.C. § 1499(c)(5)(A).

As in *Libas*, the presence of a detailed, remedial statutory scheme and the FTCA's exemption of CBP officers from suit are special factors that support the implied preclusion of Plaintiffs' *Bivens* claim against the individual CBP officers for the detention and sale of the vehicle. Dismissal of the violation of due process claim asserted against the Individual Federal Defendants is appropriate under Federal Rule of Civil Procedure 12(b)(6), because Plaintiffs have failed to state a claim for relief. Accordingly, the Court hereby dismisses with prejudice Plaintiffs' violation of due process claim against Defendants Adams, Hunter and King.

C. Common Law Tort Claims

The remaining causes of action against Moving Defendants are the common law tort claims of conversion, fraud, profiteering and coercion, collusion and duress. Although the Complaint names individual CBP employees as defendants, the United States Attorney has substituted the United States as a defendant in place of the individuals named in the Complaint pursuant to 28 U.S.C. § 2679(d)(1). As such, the United States is the only remaining Moving Defendant against which the common law tort claims are asserted.

Moving Defendants argue that dismissal of the common law tort claims is appropriate under Federal Rule of Civil Procedure 12(b)(1), because the United States is immune from suit for the common law tort claims, and the Court therefore lacks subject matter jurisdiction as to those claims. It is well established that under the doctrine of sovereign immunity, the United States cannot be sued absent consent or waiver. *Lehman v. Nakshian*, 453 U.S. 156, 160, 101 S.Ct. 2698, 2701 (1981). The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2670-2680 ("FTCA"), provides for a limited waiver of the United States' sovereign immunity. *Id.* at 161. Under the FTCA, the United States waives its sovereign immunity for personal injury claims "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). The FTCA has several enumerated exceptions to liability, including 28 U.S.C. § 2680(c), which states in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to - ...
> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer.

28 U.S.C. § 2680(c).[3] Where a § 2680 exception applies, the United States has not waived its immunity from suit, and a court lacks jurisdiction over such claims.

After a review of the plain language, legislative history and underlying purpose of § 2680(c), the Supreme Court concluded that the provision precludes any claim arising out of a customs officer's detention of goods, including "a claim resulting from negligent

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n[3] Section 2680(c) contains an exception for actions pertaining to goods seized for the purpose of forfeiture, but not actually forfeited. The exception within section 2680(c) is not applicable to this action, because Plaintiffs vehicle was not seized for the purpose of forfeiture.

---------- End Footnote ----------

handling or storage of detained property." *Kosak v. United States*, 465 U.S. 848, 854, 104 S.Ct. 1519 (1984). The § 2680(c) exclusion applies not only to damages caused solely by the detention, such as diminished value, but also includes property damage resulting from the negligent handing and storage of detained property. *Id.* at 861. Courts have extended *Kosak* and found that the § 2680(c) exception also applies to damages resulting from the sale or disposition of the detained goods where the sale or disposition occurred without notice to the owner of the goods. *See Bielass v. New England Safe System, Inc.*, 617 F. Supp. 682, 683-84 (D. Mass. 1985); *Solus Ocean Systems, Inc. v. U.S. Customs Service*, 777 F.2d 326, 328 (5th Cir. 1985). In *Solus*, the Fifth Circuit held that the claim for damages resulting from the sale without notice of goods in the custody of U.S. Customs was barred as one "arising in respect of. . . the detention of goods . . . by any officer of customs" as stated in § 2860(c). *Solus*, 777 F.2d at 328. The Fifth Circuit noted that the "sale was the result of the goods having remained with Customs for well over a year and was

merely part of the natural progression of Customs' detention. The sale took place while the goods were detained by Customs and was an incident of that detention." *Id.*

In *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994), the Ninth Circuit found that U.S. Customs agents' allegedly tortious conduct of seizing and detaining an aircraft, even if it was without probable cause, falls within the scope of activities exempted in § 2860(c). The court explained that the "actions of the Customs agents, the seizure and detention of the aircraft, are precisely the kinds of acts that Congress exempted from liability in § 2860(c)." *Gasho*, 39 F.3d at 1433. The court noted: "We recognize that our holding effectively bars any remedy for intentional tort with respect to seizures by Customs. But statutes waiving the sovereign immunity of the United States must be construed strictly in favor of the sovereign." *Id.*

Moving Defendants argue that since all of the common law tort claims asserted against them in the Complaint arise out of CBP's detention of the vehicle, CBP's refusal to permit the vehicle to enter the United States, and the eventual sale of the vehicle, they fit into the § 2860(c) exception. Plaintiffs' common law tort claims are based on allegations that various defendants changed the contact information on the "Notice of Arrival" and coerced Plaintiffs to use certain repair dealers in order to certify the vehicle for entry into the United States.

Plaintiffs do not dispute that these claims arise out of the detention and subsequent sale of the vehicle by CBP; in fact, Plaintiffs explicitly state that their common law tort claims "stem from the sale of the vehicle without the required legal notice." (Pls.' Opp. at 6:26-7:1.) Plaintiffs argue that Moving Defendants' reliance on *Kosak* is "completely misplaced," because Plaintiffs do not claim that their vehicle was damaged while in CBP's custody, but rather that their vehicle was sold. (Pls.' Opp. at 4:9-10.) Although *Kosak* did not address claims relating to the sale of detained property, the broad holding has been extended to claims relating to the sale or disposition of the property without providing notice to the property owner. That is the exact situation in this case, and Moving Defendant's reliance on *Kosak* is

appropriate.

Plaintiffs rely on *Cervantes v. United States of America*, 330 F.3d 1186 (9th Cir. 2003) to support their argument that the sale of the vehicle without the required notice does not fit within the §2860(c) exception. In *Cervantes*, the plaintiff purchased a vehicle which, four months earlier, had been seized by the Immigration and Naturalization Service ("INS"). *Cervantes*, 330 F.3d at 1187. The plaintiff was arrested and incarcerated for importing illegal drugs into the United States when 119 pounds of marijuana were found in the car's bumpers. The plaintiff alleges that neither INS nor the United States Marshals Service properly searched the car prior to its sale at auction, and if they had, they would have discovered the marijuana. *Id.* The Ninth Circuit found that the alleged negligence in failing to inspect the car before it was sold did not arise in respect of the detention of the vehicle, because the negligent act had nothing to do with the car's detention. *Id.* at 1189. The negligent act of selling the car without first inspecting it, was an "independent and intervening event from the detention itself." *Id.* The Ninth Circuit distinguished *Solus*, noting that *Solus*' "natural progression" approach did not apply, because "the harmful act was independent of and subsequent to the detention. The text of the exception is limited to claims arising from the detention, not independent activities subsequent to it." *Id.*

Unlike in *Cervantes*, where the wrongdoing associated with the sale of the car was independent of the detention of the car, here, the alleged wrongdoing was directly related to the detention and eventual sale of the vehicle. As in *Solus*, the sale of Plaintiffs' vehicle was a natural progression of CBP's detention of the vehicle, and any alleged wrongdoing in notifying Plaintiffs of the sale or providing certain repair dealers to certify the vehicle, arose directly from the detention and subsequent sale of the vehicle. The sale of Plaintiffs' vehicle occurred while the goods were detained by Customs and was an incident of that detention.

The Court agrees with Moving Defendants that Plaintiffs' common law tort claims arise out of CBP's detention of the vehicle, refusal to permit the vehicle to enter the United

States, and eventual sale of the vehicle. Following *Kosak*, *Solus*, and *Gasho*, Plaintiffs' common law tort claims fall within the § 2860(c) "detention of goods" exception to the FTCA; the United States has not waived its immunity from suit, and the Court lacks jurisdiction over the common law tort claims. The Court hereby dismisses with prejudice Plaintiffs' common law tort claims against the United States and CBP.

V. Conclusion

For the reasons stated above, the Court hereby grants the Motion to Dismiss of Defendants United States of America, CBP, the Treasury, Adams, Hunter and King (docket no. 38).

July 15, 2004

FLORENCE-MARIE
COOPER, Judge

UNITED STATES
DISTRICT COURT

NOT FOR PUBLICATION

FILED
JAN 17 2006

CATHY A. CATTERSON CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWIN DURAND; MADELAINE DURAND

No. *05-55472*
D.C. No. CV-04-02377-FMC

Plaintiffs - Appellants,

v.

MEMORANDUM*

UNITED STATES CUSTOMS, an Agency of and for the US Department of the Treasury; et al.,

Defendants - Appellees.

Appeal from the United States District Court
for the Central District of California
Florence Marie Cooper, District Judge, Presiding

Submitted January 9, 2006**
Before: HUG, O'SCANNLAIN, SILVERMAN, Circuit Judges.

Edwin Durand and Madelaine Durand appeal pro se from the district court's orders dismissing their action against the United States Customs Service, an arm of Customs and Border Patrol ("CBP"), and various entities and individuals alleging that their constitutional rights were violated when they attempted to import a Mercedes-Benz from Germany.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's dismissal orders. *See Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995) (dismissal for lack of subject matter jurisdiction and under Fed. R. Civ. P. 12(b)(6)). We review for abuse of discretion the denial of a motion for reconsideration. *School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993). We affirm.

The district court properly dismissed the Durands' constitutional tort claims against the CBP and the Treasury based on sovereign immunity. *See Arnsberg v. United States*, 757 F.2d 971, 980 (9th Cir. 1985) (rejecting *Bivens* claim against the federal government and its agencies absent waiver of sovereign immunity). The district court's dismissal of common law tort claims against the CBP and the individual federal employees was also proper. *See Gasho v. United States*, 39 F.3d 1420, 1433 (9th Cir. 1994) (holding that the Federal Tort Claims Act exempted from liability intentional tort claims arising out of a customs officer's seizure of goods); *Kosak v. United States*, 465 U.S. 848, 862 (1984). The district court properly dismissed any *Bivens* claim against the individual federal defendants because an alternative remedial scheme for relief existed, and the Durands failed to follow it. *See Libas Ltd. v. Carillo*, 329 F.3d 1128, 1130-31(9th Cir. 2003) (affirming dismissal *of Bivens* action where an alternative remedy exists and "special factors" counsel against district court adjudication of a customs dispute); 19 U.S.C. § 1514 (providing a remedy for claims that goods were excluded from entry to the United States).

The district court did not err by dismissing the Durands' claims that Crescent Warehouse ("Crescent") committed

conversion and violated a warehouseman's lien, because the Durands did not assert a warehouseman's lien, and Crescent was not responsible for selling the car. *See* Cal. Com. Code § 7210. The district court properly dismissed the Durands' intentional infliction of motional distress claim against Wallenius Wilhelmsen Lines Americas, LLC ("WWLA") because they failed to allege conduct that was extreme and outrageous. *See Braunling v. Countrywide Home Loans Inc.*, 220 F.3d 1154, 1158 (9th Cir. 2000). The civil conspiracy claim was also properly dismissed because the Durands failed to establish an underlying wrong, an essential requirement of a civil conspiracy claim. *See Grisham v. Phillip Morris US.A.*, 403 F.3d 631, 635 (9th Cir. 2005) (per curiam).

The district court properly dismissed the Durands' claim that EG&G Technical Services ("EG&G") breached its contract with CBP when it violated various state and federal laws, because the Durands had no standing to assert these claims without being a party to the contract. *See Orff v. United States*, 358 F.3d 1137, 1145 (9th Cir. 2004) (requiring a plaintiff to show that it is a party to, or the intended beneficiary of, a contract before it can sue for contract breach). Nor did the Durands have a private cause of action for "fencing stolen property." *See* Cal. Penal Code § 484(a). We find the Durands' remaining contentions with regard to EG&G unpersuasive.

The district court properly dismissed the Durands' claim of a Sherman Act violation against Mercedes-Benz USA and its employee, because these two defendants were not distinct business entities, *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir. 1988), and the allegations did not show that Mercedes was attempting to monopolize, *Image Tech. Serv., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997). The district court did nor err by determining that amendment would not have cured these deficiencies. *See McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1090 (9th Cir. 2003).

The district court did not abuse its discretion by denying the Durands' motion for reconsideration that merely reargued

issues the court had already considered and rejected. *See Fuller v. MG. Jewelry*, 950 F.2d 1437, 1442 (9th Cir. 1991).

The Durands' remaining contentions are unpersuasive.

Crescent's request for judicial notice, received on June *15*, 2004, is ordered filed, and granted.

We deny all pending requests for costs pursuant to Fed. R. App. P. 38 and for attorney's fees pursuant to Fed. R. App. P. 39, without prejudice to the filing *of* such motions in accordance with Fed. R. App. P. 38 and Ninth Circuit Rule 39-1.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWIN DURAND; et al.,

Plaintiffs - Appellants,

v.

UNITED STATES CUSTOMS, an Agency of and for the US Department of the Treasury; et al.,

Defendants - Appellees.

No. 05-55472
D.C. No. CV-04-02377-FMC

JUDGMENT

Appeal from the United States District Court for the Central District of California, Los Angeles.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment *of* the said District Court in this cause be, and hereby is

AFFIRMED.

Filed and entered 01/17/06

(415) 556-9800

United States Court of Appeals for the Ninth Circuit
95 Seventh Street
Post Office Box 193939
San Francisco. California 94119-3939

March 20, 2006

USDC, Los Angeles
Central District of California, Los Angeles
Office of the Clerk
312 North Spring Street
Los Angeles, CA 90012

No.	Title	**Agency/D.C. No.**
05-55472	Durand v. US Customs	CV-04-02377-FMC

Dear Clerk:

The following document in the above listed cause is being sent to you under cover of this letter.

Certified copy of the Decree of the Court

The record on appeal will follow under separate cover. Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,
Cathy A. Catterson
Clerk of Court
By: Synitha Fuller Deputy Clerk

Enclosure(s)
Cc: All Counsel